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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM C. BUSH,
Petitioner

v.

WILLIAM R. LUCAS,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

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WILLIAM C. BUSH,
Petitioner

v.

WILLIAM R. LUCAS,
Respondent[1]

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner William C. Bush prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit as rendered in this case on remand

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[1] This caption contains the names of all parties to the proceeding in the courts below.

pursuant to prior grant of certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. Does a plaintiff's status as a civilian employee of the federal government preclude a *Bivens*-type suit by such plaintiff personally against another federal civilian employee personally, for such defendant's alleged violations of that plaintiff's First or Fifth Amendment rights in course of that defendant's procuring of that plaintiff's demotion?

2. Does administrative relief with respect to such demotion, *qua* personnel action, pre-empt a *Bivens*-type suit by the improperly demoted employee, as an individual person, against the individual person who, while purporting to act in his official executive position, allegedly conspired with others to procure the demotion in retaliation for the plaintiff's public-

ly commenting upon personnel and management practices at the governmental facility where both parties were employed and which the defendant headed?

TABLE OF CONTENTS

Page

Petition for Writ.....1

Questions Presented.....2

Table of Contents.....3

Table of Authorites.....4

Opinions Below.....8

Jurisdiction of this Court.....8

Constitutional Provisions, Statutes and Regulations Involved.....9

Statement of the Case.....10

Reasons for Granting the Writ...20

To Settle Important Questions of Federal Law.....20

To Resolve An Emerging Conflict Among the Courts of Appeal.....31

Page

Conclusion.....35

Appendix A.....a-1

Appendix B.....b-1

Appendix C.....
Appendix D.....
Appendix E.....
Appendix F.....
Appendix G.....
Appendix H.....
Appendix I.....
Appendix J.....

BOUND SEPARATELY

TABLE OF AUTHORITIES

Cases:

Barr v. Matteo, 360 U.S. 564 (1959)..15, 27

Bishop v. Tice, 622 F. 2d 349 (8th Cir. 1980).....*passim*

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).....*passim*

Branti v. Finkel, 445, U.S. 507 (1980)...25

Page

Brown v. GSA, 425 U.S. 820 (1976) 30n

Bush v. Lucas, 598 F. 2d 958 (5th Cir. 1979) *vacated and remanded*, 446 U.S. 914, 100 S. Ct. 1846, 64 L. Ed. 2d 268 (1980).....17, 18, 19

Bush v. Lucas, 647 F. 2d 573 (5th B Cir. 1981).....*passim*

Butz v. Economou, 438 U.S. 478 (1978).*passim*

Carlson v. Green, 446 U.S. 14 (1980)..*passim*

Davis v. Passman, 442 U.S. 228 (1979).*passim*

Elrod v. Burns, 427 U.S. 347 (1976).....25

Keyishian v. Board of Regents of New York, 385 U.S. 589 (1967).....25

Perry v. Sinderman, 408 U.S. 593 (1972)..25

Pickering v. Board of Education, 391 U.S. 563 (1968) 13, 13n

Slochower v. Board of Ed. of N. Y., 350 U.S. 551 (1955).....25

Sonntag v. Dooley, 650 F. 2d 904 (7th Cir. 1981).....30n, 32, 33

Weiman v. Updegraff, 344 U.S. 183 (1952).....25

Page

Constitutional Provisions:

Art. III, §2, cl. 1, U. S. CONST.....9

Amend. I, U. S. CONST....2, 9, 13, 14, 26

Amend, V, U. S. CONST.....2, 9, 26, 28n

Statutes:

5 U. S. C. § 1301.....9

5 U. S. C. § 3302.....9

5 U. S. C. § 5596.....9

5 U. S. C. § 7511.....9

5 U. S. C. § 7701.....9

28 U. S. C. § 1254(1).....9

28 U. S. C. § 1331.....9

28 U. S. C. § 1442(a)(1).....9, 14

28 U. S. C. § 1446.....9

Tit. 7 § 26, Ala. Code 1940.....13n

Tit. 7 § 6-2-39, Ala. Code 1975.....13n

Regulations:

5 C.F.R. Part 752.....9

5 C.F.R. Part 772.....9

Page

Rules:

Civil Service Rule 5.1 Exec. Ord. No. 10577, 19 Fed. Reg. 7521 (1956)....9

Briefs and Petitions:

Brief for Respondent, *Bush v. Lucas*, 446 U.S. 914.....21n

Petition for a Writ of Certiorari, *Bush v. Lucas*, 446 U.S. 914...8, 8n, 21n

Petition for Rehearing and Suggestion of Rehearing *en banc*, *Sonntag v. Dooley*, No. 80-2435, 7th Cir. 1981....34

Plaintiff's Opposition to Motion to Dismiss Individual Defendants, *Mundy v. Brown*, No. 80-2096, D.C. Dist. 1980.....30n

Supplemental Brief for Appellee, *Bush v. Lucas*, 647 F. 2d 573 (5th Cir. 1981).....29n

OPINIONS BELOW

The court of appeals' opinion (App. A hereto, a-1---a-12) on remand[2] appears at 647 F. 2d 573. That court's original opinion (App. C, c1-1---c1-14) appears at 598 F. 2d 958. A copy of the district court's unpublished memorandum of opinion appears at pp. d-2---d-17 of Appendix D hereto.

JURISDICTION OF THIS COURT

The court of appeals' judgment on remand bears date of 12 June 1981. It was entered on that day. The present petitioner (whom we hereinafter call "Bush")[3] did

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[2] On 28 April 1980, this Court granted Bush's first petition for certiorari in this case, vacated the original judgment of the Court of Appeals for the Fifth Circuit, and remanded the case to that court "for further consideration in light of *Carlson v. Green....*" *Bush v. Lucas*, 446 U.S. 914, 100 S. Ct. 1846, 64 L. Ed. 2d 268, *vacating* 598 F. 2d 958 (5th Cir. 1979); and see Appendix B hereto.

[3] We likewise hereinafter call the respondent by his surname, "Lucas."

not apply for rehearing. Bush invokes the jurisdiction of this Court under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

This case involves the following constitutional provisions, statutes, rules and regulations the relevant parts of which are set forth in Appendix H hereto:

Art. III, § 2, cl. 1, U. S. CONST.;

Amend. I, U. S. CONST.;

Amend. V, U. S. CONST.;

5 U. S. C. §§ 1301, 3302, 5596, 7511, 7701;

28 U. S. C. §§ 1331, 1442(a)(1), 1446;

Civil Service Rule 5.1 Exec. Ord. No. 10577, 19 Fed. Reg. 7521 (1956);

5 CFR §§ 752.101, 752.104, 752.202, 752.203, 752.401, 772.101, 772.102, 772.301, 772.305, 772.307, 772.308, 772.309, 772.310 and 772.312 (1975).

STATEMENT OF THE CASE

Both Bush and Lucas are career civilian employees of the United States Government. At all material times, Bush has been an aerospace engineer employed at the George C. Marshall Space Flight Center (hereinafter called "MSFC") and Lucas has been Director of that major field facility of the National Aeronautics and Space Administration (hereinafter called "NASA").

In course of a major reorganization in 1974, MSFC management assigned Bush to a new position. He found few if any actual duties corresponding to the description of the position. Intra-organizational efforts to induce MSFC management to change or abolish the position were unavailing. In separate appeals to the Civil Service Commission (hereinafter called the "CSC"), Bush assailed both the classification of the position and his assignment to the

position.

During the pendency of *those* administrative "appeals," in the spring of 1975, the media attributed several public statements to Bush to the effect that his job was a falsehood, a travesty and worthless; and that he was reporting what appeared to be a fraudulent use of federal funds. Some of the statements received national dissemination by way of a news release.

When certain media representatives asked Lucas, in late June of 1975, about Bush's statements, Lucas said:

> Mr. Bush has made certain statements to the effect that he does not have meaningful work to do. I have had that statement [*sic*] investigated and I can say, unequivocally, that such a statement has no basis in fact.

In August of 1975, MSFC management commenced an adverse action against Bush

for having made the public statements attributed to him. After Bush's written and personal answers to the notice of proposed adverse action, Lucas, as agency deciding official, reduced Bush two General Schedule grades in the civil service and assigned Bush to a different position at MSFC. Bush timely appealed the adverse decision to the CSC. The initial CSC decision (Appendix E hereto) sustained the agency action. On Bush's petition, however, the CSC's Appeals Review Board, as that body was called in July of 1978, rendered a decision (Appendix F hereto) reversing the initial CSC decision and recommending that Bush be restored retroactively "to his former position, grade and pay...." (App. F, f-26.) Applying a *Pickering*[4]-type balancing test, the Appeals Review Board based its decision upon a

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[4] *Pickering v. Board of Education*, 391 U.S. 563 (1968)

perceived unjustifiable "abrogation of the exercise of free speech" (*ibid.*, f-25). After the Civil Service Commissioners dedenied (Appendix G hereto) NASA's petition to reopen the Appeals Review Board's decision, MSFC took the corrective action recommended by the Board.

Administrative review of Bush's reduction-in-grade lasted from December of 1975 until October of 1978. While such review was still pending at the first level of the CSC's appellate hierarchy, and on the day before an Alabama statute of limitations[5] might have barred the action, Bush sued Lucas individually in a state court. In that suit, Bush sought to recover damages for defamation (Complaint, Counts One through Three) and for conspiracy "to deprive...[Bush] of his constitu-

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5 Tit. 7 § 26, Ala. Code 1940, as "Recompiled,"---now Subdivs. (4) and (5) of § 6-2-39, Ala. Code 1975, effective 31 Oct. 1977.

tional rights of freedom of speech and of petition to Congress and to reduce...[him in civil-service grade]..." (*ibid.*, Count Four, 1st of two ¶¶ numbered "2"). The defamation allegedly lay in the falsity, malice and publication of Lucas' utterance (*ante*, p.7) about one of Bush's prior statements' having "no basis in fact." The conspiracy allegedly lay in Lucas and his co-conspirators' conduct in having concocted and consummated the adverse personnel action against Bush in retaliation for the latter's having exercised his aforementioned First Amendment rights. (Complaint, Count Four, *passim*.)

Lucas timely removed the suit to the United States District Court for the Northern District of Alabama. Jurisdiction in that court rested on 28 U. S. C. § 1442 (a)(1), relating to the removal of actions begun in state courts against officers or agencies of the United States for acts

under color of office, etc.

After such removal of the suit, and without answering the complaint, Lucas moved alternatively for dismissal of the complaint or for summary judgment. Apart from the general ground of failure to state a claim upon which relief could be granted, Lucas rested his motion exclusively upon the doctrine of absolute executive immunity under *Barr v. Matteo*, 360 U. S. 564 (1959).

Before Bush responded to the Lucas motion, the Federal Employee Appeals Authority rendered the initial CSC decision (Appendix E hereto) on Bush's administrative appeal from MSFC's reducing him in grade. Lucas' counsel informally called that administrative ruling to the attention of the district court at some time prior to that court's ruling on the Lucas motion.

After completion of the limited dis-

covery permitted by the district court, and after supplementation of both the Lucas motion and the Bush response, the district court granted the motion for summary judgment. (App. D, d-1.) In a memorandum-opinion (App. D, d-2---d-17), the district court considered the defamation claim and the conspiracy claim discretely. Treating the former with no constitutional overtones or implications (*ibid.*, d-7, d-8), the district court regarded *Barr v. Matteo* as controlling (*ibid.*, d-4) on the point of Lucas' immunity to suit on that claim, as discretely considered.

While regarding the conspiracy claim as asserting violations of Bush's constitutional rights and as being "based on the seminal case of *Bivens v. Six Unknown Named Agents of the Bureau of Narcotics*, 403 U. S. 388 (1971)..." (App. D, d-12), the dis-

trict court nevertheless concluded that the availability of administrative relief, albeit from the Government and not from Lucas (*ibid.*, d-15, n. 5), precluded Bush from maintaining suit against Lucas for "damages based," as the district court said, "on...[Bush's] demotion, allegedly contrived as a punishment for...[Bush's prior public] statements" (*ibid.*, d-16).

In affirming (598 F. 2d 958 [5th Cir. 1979]; Appendix C1 hereto) the judgment of the district court, the court of appeals substantially adopted the view of the district court. The court of appeals regarded this Court's intervening decisions in *Butz v. Economou*, 438 U. S. 478 (1978), and *Davis v. Passman*, 442 U. S. 228 (1979), and the intervening administrative restoration of Bush to his former grade, position and pay (App. F, f-25---f-26; App. G, g-3) as buttressing the district court's reasoning and ruling. The Fifth Circuit said

that it affirmed the district court

> [b]ecause *Butz v. Economou* affords the defendant immunity in the defamation part of this claim; and the rationale of *Davis v. Passman* forecloses a cause of action for damages under the circumstances of this case....
>
> (598 F. 2d at 959; Appendix C1 hereto, c1-4.)

When this case first reached this Court, on Bush's first petition for certiorari, the then Solicitor General suggested that this Court "hold... this case pending the disposition ...[of] *Carlson [v. Green]*." Brief for Respondent, at 7, *Bush v. Lucas*, 446 U. S. 914. On 22 April 1980, this Court decided *Carlson v. Green*, 446 U. S. 14. Six days later, this Court vacated the original judgment of the court of appeals in this case and remanded the case to that court "for further consider-

ation in light of *Carlson v. Green*, ..." *Bush v. Lucas*, supra, note 1.

On remand, that court of appeals has "conclude[d] that *Carlson* does not dictate a contrary result [to that attained upon the court of appeals' original consideration of Bush's appeal.]" (647 F. 2d at 575; App. A, p. a-2.) Accordingly, the court of appeals has reaffirmed the summary judgment for Lucas. (*Ibid.*) The court of appeals bases such reaffirmance upon: (1) the apparent absence of any impact by *Carlson* on the Fifth Circuit's prior holding with respect to Bush's defamation claim (647 F. 2d at 574; App. A, p. a-3); and (2) the proclaimed presence in this case of a "special factor counselling hesitation in the absence of affirmative action by Congress...." (647 F. 2d at 575, 576, 577; App. A, pp. a-4, a-5, a-6, a-11, a-12).

The Fifth Circuit finds such special factor in "the Government employer-employee

relationship present in this case." (647 F. 2d at 577; App. A, p. a-12.) The Fifth Circuit regards such finding as being "consistent with *Carlson*" (*ibid.*) and as serving to distinguish this case "from cases such as *Bivens* and *Carlson* which involved plaintiffs as private citizens seeking damages against agents of the Government acting in its sovereign capacity..." (647 F. 2d 577; App. A., p. a-10).

REASONS FOR GRANTING THE WRIT

1. To settle important questions of federal law.

The primary question in this case is whether a plaintiff's mere status as a civilian employee of the United States precludes his being accorded a *Bivens*-type remedy to recover damages for wrongs unconstitutionally consummated in the employment context and not fully redressed by the administrative remedies provided for correct-

ing wrongful personnel actions. A second question, professedly pretermitted (647 F. 2d 575, 577; App. A, pp. a-6, a-12) but perhaps only preserved by the court of appeals, is whether the administrative remedies pre-empt a *Bivens*-type claim for residual damages not covered by the administrative remedies.[6]

These are important questions. The

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[6] This second question is substantially the same as Question No. 1 in Bush's prior petition for writ of certiorari, to obtain review of the Fifth Circuit's original decision affirming the district court's granting of Lucas' motion for summary judgment. *See* Petition for Writ of Certiorari at 3, *Bush v. Lucas*, 446 U.S. 914. That was one of the two questions which the government suggested "should be disposed of as appropriate in light of *Carlson v. Green*...," then under submission in this Court, *See* Brief for Respondent at 7--8, *Bush v. Lucas*, *supra*. Several features of the Fifth Circuit opinion presently sought to be brought under review militate against any sanguine assumption that that circuit necessarily would view *Carlson* as compelling the conclusion that the other, partial, remedies accorded Bush *by the government* do not pre-empt a *Bivens*-type claim by

approximately three million civilian employees of the federal government (Appendix I hereto) appear to us to be entitled to know, nationwide, whether, for constitutional deprivations sustained in the course

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Bush against Lucas *personally*. First, the Fifth Circuit opinion of 12 June 1981 in this case reflects a very narrow, not to say grudging, reading of *Carlson*. Second, the Fifth Circuit opinion of 12 June 1981 stresses the negative, rather than the positive, features of *Carlson*; the Fifth Circuit opinion speaks more of what *Carlson* says about defeating a *Bivens*-type claim than of what *Carlson* says about the effectiveness of a *Bivens*-type remedy. Third, the Fifth Circuit opinion of 12 June 1981

> stress[es] the remedies made available by Congress to an aggrieved civil servant in order to emphasize the care Congress has taken to carefully balance the employee's rights as a citizen with the Government's interest in the efficient conduct of the nation's business.
>
> (647 F. 2d at 576--577; App. A, pp. a-9--a-10.)

Fourth, the Fifth Circuit opinion of 12 June 1981 embraces a gratuitous econium upon a postulated "comprehensive... scheme" (647 F. 2d at 577; App. A, p. a-10) of blended legislative and administrative personnel grievance procedures

of their employment, they may maintain *Bivens*-type damage suits in federal courts against federal functionaries who cause such deprivations.[7] Moreover, if "the

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(647 F. 2d at 576; App. A, pp. a-8---a-10). Fifth, the author of that opinion would distinguish this case from *Bivens* and *Carlson* on the basis of the difference between a plaintiff who is a government employee and plaintiffs who "were private citizens seeking damages against agents of the Government acting in its sovereign capacity." (647 F. 2d at 577; App. A, p. a-10.) Sixth, in disregard of the fact that Bush has *not* bypassed his administrative remedies, the Fifth Circuit opinion of 12 June 1981 evokes the spectre of

> aggreived employees ... bypass[ing] the statutory and administrative remedies in order to seek direct judicial relief and thereby depriv[ing]... the Government of the opportunity to work out *its personnel* problems within the framework it has so painstakingly established.
>
> (647 F. 2d at 577; App. A, pp. a-10--a-11; italics ours.)

7 It may not be entirely captious to suggest that those three million federal civilian employees need to know whether our system of justice accords them qualitatively the same access to courts as it accords the approximately 26,000 prisoners currently incarcerated

unique relationship between the Federal Government and its civil service employees" (647 F. 2d at 576; App. A, p. a-6) per se justifies one court in debarring those employees from maintaining *Bivens*-type actions against federal functionaries, will it not also justify courts or successive Congresses---and whether under pleas of paramount public interest or under pleas of simple rationality---in future curtailment of hard-won constitutional protections for other interests of government employees than in maintaining particular types of suits against particular types of wrongdoers? The simplistic rationale which, for the Fifth Circuit, today justifies limitation of access to courts for redress of unconstitutional reprisals may tomorrow be used to justify

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in federal correctional institutions (Appendix J hereto). Cf. *Carlson v. Green*, 446 U.S. at 18 et passim.

other debasement of governmental service. If such is to be the case, it should be so, we submit, as a matter of "principled choice" by *this* Court and not of expedient shift by any lower federal court.

In its tendency to make second-class citizens of civilian governmental employees, the Fifth Circuit opinion of 12 June 1981 runs counter to a course of almost three decades of constitutional adjudication which, overall, has expanded rather than contracted the body of constitutionally protected interests of government employees. *See, e. g., Wieman v. Updegraff,* 344 U.S. 183 (1952); *Slochower v. Board of Ed. of N. Y.,* 350 U.S. 551 (1955); *Keyishian v. Board of Regents of New York,* 385 U.S. 589 (1967); *Perry v. Sinderman,* 408 U.S. 593 (1972); *Elrod v. Burns,* 427 U.S. 347 (1976); and *Branti v. Finkel,* 445 U.S. 507 (1980.)

Although those cases involve state or local employees rather than federal employees, the difference between employers is not sufficient, we submit, to justify a jettisoning in this case of fundamental principles permeating those cases.

One of those fundamental principles, albeit one not uniformly articulated, is that the dignity of the individual person is a value of continuing vitality in an evermore monolithic milieu. It is a constitutional value. It is the value underlying much of the Bill of Rights. Is that fundamental value to be compromised to preclude a *Bivens*-type action by one individual person who happens to be a civilian employee of the federal government against another individual person who also happens to be a civilian employee of the federal government? If such a compromise is to be sanctioned, under the name of "accomodation" or otherwise, should it

not be only after full reflection by the Court which decided *Bivens*, *Butz*, *Davis* and *Carlson*?

Similarly, if, notwithstanding *Butz*, absolute executive immunity is in effect to be restored in instances where *Bivens*-type plaintiffs suffer from the postulated disability of being federal civilian employees, should not such qualification of *Butz* be first considered by the Court which decided *Butz*, rather than by courts at a tier which for years made a shibboleth of the plurality decision in *Barr v. Matteo*, 360 U.S. 564 (1959), for which practice *Butz* provided a long overdue corrective?

Finally, the once-and-prospectively-future aberrations of the Fifth Circuit[9] and the resultant confusions of the Eighth

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[9] Please *compare* the Fifth Circuit opinion on original deliverance in this

Circuit[10] on the question of the postu-- lated pre-emptive effect of administrative remedies cry out for correction before the Department of Justice, in the perhaps not always congenial task of defending federal functionaries in *Bivens*-

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case, 598 F. 2d at 961, App. C1, pp. C1-11---C1-14, *rehearing denied mem.*, 605 F. 2d 554, App. C4, pp. C4-1--C4-2, *with* the features of the Fifth Circuit opinion on remand which are mentioned in n. 6, *supra*.

10 In its overall somewhat ambivalent opinion in *Bishop v. Tice*, 622 F. 2d 350 (1980), the Eighth Circuit, while according the appellant former government employee a remedy, even a damage remedy under the Fifth Amendment (522 F. 2d 357), declined to derive such remedy from *Bivens* through *Davis* and *Carlson*. In support of its conclusion that the CSC remedies of re-instatement and back-pay obviated a *Bivens*-type remedy (622 F. 2d at 356--357) and, in fact, "constitute[d]...a 'special factor counseling hesitation' in the creation of a constitutionally based remedy for a wrongful dismissal..." (622 F. 2d at 357), the Eighth Circuit both cited the Fifth Circuit opinion on original deliverance in the case at bar (together with its subsequent history of being vacated and remanded, etc.) and, in a

type suits, further disseminates[11] the errors descended from the trial court's and the Fifth Circuit's initial de-constitutionalization of Bush's *Bivens*-type claim by according pre-emptive force to the CSC remedies available to him.

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footnote, said that it, the Eighth Circuit, had "examined *Carlson v. Green* ... and ...[found] it consistent with ...[the Eighth Circuit's] result [in *Bishop v. Tice*]." (622 F. 2d at 357 n. (6.) Perhaps the key word in the footnote was "result."

11 On remand of the case at bar, the Department of Justice filed a supplemental brief in which it urged, inter alia, not only that the administrative remedies available to federal civilian employees pre-empted *Bivens*-type suits but also, in effect though not in terms, that those administrative remedies were gracious facets of a pervasively preclusive special relationship between the Federal Government and its civilian employees. Supplemental Brief for Appellee, at 16--20 *et passim*, *Bush v. Lucas*, 647 F. 2d 573 (5th Cir. 1981). In that brief, the Department of Justice cited and discussed *Bishop v. Tice* as recognizing the existence of administrative remedies as "'a special factor counseling hesitation' in the creation of a constitutionally based remedy for a wrongful dismissal." (*Ibid.*, at 27-28.)

Those aberrations and the resultant confusion arise, in our judgment, from misreadings of *Carlson*. They should not be allowed to proliferate.

That brief bore fruit in the Fifth Circuit opinion presently sought to be brought under review.

To judge from a rejoinder-item provided us by counsel for the plaintiff in a case reportedly pending in the United States District Court for the District of Columbia, the Government there has made substantially the same use of *Bishop v. Tice* which it made upon remand in the case at bar. Plaintiff's Opposition to Motion to Dismiss Individual Defendants at 11--12, *Mundy v. Brown*, No. 80-2096, D. C. Dist. 1980.

And, as we observe in text infra, the Department of Justice appears currently to be blending the Fifth Circuit opinion on remand with the Eighth Circuit opinion in *Bishop v. Tice* and with this Court's decision in *Brown v. GSA*, 425 U.S. 820 (1976), in an effort to induce the Seventh Circuit to grant a rehearing *en banc* in *Sonntag v. Dooley*, 650 F. 2d 904 (7th Cir. 1981).

2. *To resolve an emerging conflict among the courts of appeal.*

In the decision sought to be brought under review upon this petition, the Fifth Circuit squarely has held that

> the Government employer-employee relationship ..., is a special factor which counsels hesitation in recognizing a constitutional cause of action in the absence of affirmative action by Congress.
>
> (647 F. 2d at 577; App. A, p. a-12.)

In addition, the Fifth Circuit clearly has intimated that, even if it did not presently hold that such relationship per se constitutes "a special factor counselling hesitation" in the inferring of a *Bivens*-type remedy for a federal civilian employee who seeks to recover damages from another fed-

eral civilian employee for unconstitutional conduct in procuring the plaintiff's demotion, that Circuit would join the Eighth Circuit in finding such a "special factor" in the existence of civil service remedies which a *Bivens*-type remedy might encourage federal employees to by-pass. (647 F. 2d at 577; App. A, p. a-11, citing and closely paraphrasing, but not quite quoting, *Bishop v. Tice, supra.)*

In *Sonntag v. Dooley*, 650 F. 2d 904 (7th Cir. 1981), the Seventh Circuit has reversed a district court dismissal of a former federal employee's complaint seeking damages from government employees for coercing the plaintiff's resignation by conduct which allegedly, if somewhat loosely, included constitutional deprivations. In so reversing the district court, the Seventh Circuit has both distinguished and reconciled *Bishop v. Tice* (650 F. 2d at 907.) The Seventh Circuit's ground for

distinguishing *Bishop* is that the latter did not involve a coerced resignation. (*Ibid.*) The Seventh Circuit's basis for reconciling *Bishop* and *Sonntag* is that

> both the majority and the dissent in *Bishop* agreed that if the plaintiff there could prove that his failure to exhaust adminstrative remedies had been due, as alleged, to defendants' misconduct, he would have an actionable procedural due process claim such as that advanced by ...[the *Sonntag*] plaintiff....
>
> (*Ibid.*)

In applying for rehearing in *Sonntag*, the Justice Department attorneys assert, among other things, that:

> ****The [*Sonntag*] panel's ruling... conflicts directly with *Bush v. Lucas*, 647 F. 2d 573 (5th Cir. 1981) and *Bishop v. Tice*,

622 F. 2d 349 (8th Cir. 1980); and that

**** **** ****

> In light of the *compelling Bush v. Lucas* rationale,... [the Seventh Circuit] should look again at the panel's unprecedented ruling that civil servants may circumvent the civil service system, and vindicate their *job grievances* in lawsuits under *Bivens*.
>
> (Petition for Rehearing and Suggestion of Rehearing *en banc* at 1, 2 [emphasis at *compelling* and at *job grievances* ours], *Sonntag v. Dooley*, No. 80-2435, 7th Cir.)

Even discounting both hyperbole and dissonance, it does appear that there is

in fact an emerging, if not already emerged, conflict in principle among decisions of the several courts of appeal with respect to one or both the important questions presented for review on this petition. Such conflict, we submit, should be resolved before it begets widespread lack of uniformity.

CONCLUSION

For the reasons set forth above, Bush submits that a writ of certiorari should issue to review the 12 June 1981 judgment and opinion of the Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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4 September 1981.